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Bell Labs Innovations



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May 6, 1997

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Re: CCB Pol 97-4; CC Docket No. 96-98/Petition of MCI for Declaratory Ruling

Dear Mr. Caton:

Enclosed please find an original and five (5) copies of Lucent Technologies Reply Comments for filing in the above-referenced proceeding. Also enclosed is a copy to be stamped and returned for our files.

Please do not hesitate to contact me should there be any questions.

Sincerely,


Gena L. Ashe

Enclosure
cc: by hand:

Janice Myles, CCB
ITS, Inc.

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SUMMARY

In addressing MCI's Petition, the Commission must not encroach upon the intellectual property rights of third parties and should treat the intellectual property of telecommunications vendors no differently than it would treat the intellectual property of any other party. The Commission can do this by first, recognizing that certain of vendors' intellectual property may be implicated by a CLEC's resale of ILEC's services or access to unbundled network elements, depending upon, among other things, the contemplated use of that intellectual property and that intellectual property owners' rights to protect their property may in no way, be compromised by the Commission's ruling and second, by focusing its attention on the allocation of responsibility for securing any needed additional rights or licenses which may be needed for the use of said third party intellectual property and the proper forum for determining that allocation. In this regard, Lucent stands ready to negotiate any additional license terms which may be reasonably required to permit CLECs to resell ILECs' services and obtain access to unbundled network elements.

Further, to clarify certain questions regarding the implication of intellectual property raised in comments filed in this proceeding, Lucent provides specific examples of situations in which a third party's intellectual property may be implicated by a CLEC's resale of ILEC's services or access to unbundled network elements.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	File No. CCBPol 97-4
Petition of MCI)	CC Docket No. 96-98
for Declaratory Ruling)	

Reply Comments of Lucent Technologies Inc.

Lucent Technologies Inc. ("Lucent") hereby submits its reply to comments filed in the matter of MCI Telecommunications Corp.'s ("MCI") Petition for Declaratory Ruling, CCBPol 97-4 (March 11, 1997) (the "Petition"), in which MCI requests the Federal Communications Commission (the "Commission") to rule that new entrants need not obtain separate license or right-to-use agreements before purchasing access to unbundled network elements or reselling services of incumbent local exchange companies ("LECs").

I. Introduction

Lucent recognizes and supports the Commission's interest in promoting local competition and in avoiding undue barriers to competing local exchange companies' ("CLECs") entry into the local market. However, Lucent's position,

consistent with other parties to this proceeding, is that the Commission's goals can and should be attained without encroaching upon vendors' intellectual property rights. In this regard, vendors' intellectual property rights (including Lucent's) should not be treated any differently than any other person's intellectual property rights. It is Lucent's belief that CLECs' provision of telecommunications services will implicate the intellectual property of many parties, including, but not limited to, vendors of telecommunications infrastructure equipment. As a result, CLECs will be required to independently assess the intellectual property implications of these offerings.

As set forth in its initial comments, Lucent's position is that its intellectual property is one of its most valuable assets and therefore, its protection is paramount. As a general matter, Lucent believes that, for use of Lucent's equipment and/or software for its inherent functionality, it would not require additional licenses for a CLEC's resale of an ILEC's services or access to an ILEC's unbundled network elements. However, depending upon the nature of the intellectual property in question, the applicable intellectual property or contract law, the scope of restrictions set forth in the license grant, and particularly, the nature of the access and use contemplated by the CLEC, there may be instances where additional rights or licenses are required. The Commission's pro-competitive policies should not encroach upon Lucent's rights as a vendor of telecommunications equipment and/or software, and more broadly as an owner of

intellectual property, to protect its intellectual property as appropriate and permissible by law.

Some of the responses to the Petition raised questions about the nature of the intellectual property impacted by the resale of ILEC's services and access to unbundled network elements and questioned the validity of an ILEC's (or its vendors') claims that intellectual property is implicated in such circumstances.¹

In reply, Lucent believes there are circumstances in which a CLEC's use of a vendor's intellectual property to resell an ILEC's services or access unbundled elements may exceed the scope of an originally granted express or implied license, requiring the procurement of additional rights or licenses. Further, Lucent has a legally enforceable interest in its intellectual property apart from the sale of its equipment and/or licensing of its software, and which, in the case of a sale of its equipment and/or licensing of its software, survives the sale or licensing. Lucent therefore, takes this opportunity to clarify the nature of its intellectual property rights and to provide examples of the circumstances under which those rights are implicated.

II. Lucent Has a Legally Enforceable Interest in Its Intellectual Property Which is Not Negated by the Sale of Its Products

Certain commenters suggest that any contention by ILECs that intellectual property is implicated by resale or unbundled access is meritless as a matter of

¹ AT&T comments at 2.

law. To support this position, one commenter cites the patent exhaustion doctrine and the general principles of copyright law.²

PATENTS

To declare that a patent owner's rights with respect to a product sold terminate with its sale because of the patent law principle of exhaustion, does not acknowledge the much broader scope of the patent issues involved in the circumstances in question. There are many options available to the patent owner/vendor under the patent laws to preserve its rights with respect to patents implicated upon the sale of a product in which such patents are embedded. For example, a long line of cases have established that a patent owner may sell a patented product pursuant to restrictions which are within the scope of the patent grant or otherwise justified.³ Thus, any vendor of equipment has the right to condition the use of that equipment, including reuse by others, upon certain limitations reasonably associated with the patent rights afforded that vendor.

Furthermore, the exhaustion doctrine clearly does not apply to method or process patents. Use of the equipment pursuant to such method claims can be licensed expressly by the patent owner when selling the equipment. An implied license to use the equipment for its inherent functionality would normally extend

² AT&T comments at 19-20.

³ See, e.g., Mallinckrodt Inc. v. Medipart Inc., 24 U.S.P.Q. 2d 1173 (Fed.Cir. 1992) (and cases cited therein).

to the purchaser of the equipment, provided the patent owner's conduct, at the time of sale, gave rise to such an implication.⁴ However, it is quite clear that the patent owner may restrict the usage of such method claims (even if necessarily performed by the equipment sold) to only the purchaser of the machine and no one else.⁵ Consistent with these principles of law, Lucent does not waive any rights it may have with respect to such conditional use already included in existing agreements or that it may wish to include in future contracts with purchasers.

Finally, many patents are directed to a combination of network elements and to the processes implemented by such combinations. It is Lucent's position that it does not waive any rights it has under patents covering such combinations in the event that a CLEC combines a portion of its own network with an unbundled network element of an ILEC and in so doing, forms an infringing combination. The same preservation of rights would apply to the provision of services offered by a CLEC in part with its own network elements and in part with the network elements of an ILEC. Under these circumstances, Lucent, as a vendor of the original equipment to the ILEC (as it currently does and historically has done with respect to the sale of its equipment), would want to preserve its right to license such patents on fair and reasonable terms.

It is particularly in this context that Lucent, as an intellectual property owner, requests to be treated no differently than any other entity which may own

⁴ Met-Coil Systems Corp. v. Korners Unlimited, Inc., 231 U.S.P.Q. 474 (Fed.Cir. 1986)).

intellectual property implicated by a CLEC's use. Just as it is beyond the scope of the Commission's authority to grant MCI, in its capacity as a CLEC, implied licenses to AT&T's (or other service providers) intellectual property necessary to implement an interconnection service offering, or vice-versa, (and surely each would object to the other obtaining such rights), or grant any CLEC rights to intellectual property of persons not involved in any respect in the CLEC's interconnection activities but who nonetheless, have rights to intellectual property affecting a CLEC's intended use, Lucent simply wishes to have its intellectual property rights recognized, treated and protected like those of any other owner of intellectual property.

SOFTWARE

AT&T also contends that the basic prohibitions of copyright law (copying, distribution, publication or preparation of derivative works) do not present an obstacle to a CLEC's resale of ILEC's services or access to unbundled network elements.⁶ This argument, however, ignores the fact that intellectual property is also legally protected by applicable contractual terms and conditions. This is particularly true for software.

⁵ See Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 223 U.S.P.Q. 982 (Fed. Cir. 1984).

⁶ AT&T comments at 19.

All software provided by Lucent to its customers is provided pursuant to license agreements which specify the scope of the grants applicable to that software. While it is clear that any use of the software in a manner inconsistent with the statutorily imposed prohibitions mentioned above would violate Lucent's legal rights, so would a CLEC's use of the software (be it embedded or application software) in a manner which exceeds the scope of the contractually provided license grant. In that case, an additional license agreement, under commercially reasonable terms, would be required.

There are many examples of license provisions in which a CLEC's access to unbundled network elements might give rise to exceeding the scope of the original license grant and, in turn, additional license grants would be required. This includes, but is not limited to, license provisions containing capacity restrictions⁷, license provisions with restrictions on third party use⁸, and license provisions which restrict the activation of features or functionality.⁹

⁷ Sometimes Lucent licenses its software with provisions limiting the use of the software beyond a certain capacity (i.e. number of minutes, number of users, etc.). In these instances, if a CLEC's resale or access to unbundled network elements results in use beyond the specified capacity for which the software was originally licensed, then either the scope of the original license must be expanded or a new license must be issued.

⁸ For example, Lucent's Software Development Platform (Service Creation Environment (SCE)), which is used to create specific applications for feature functionality, is typically licensed pursuant to the following license grant:

"Lucent grants buyer a personal, nontransferable, nonexclusive right to use the licensed Software ordered hereunder."

With this license, the right to use the SCE as a development platform is "personal" to the original licensee (e.g. the ILEC) and no other third party (e.g. CLEC) may use this SCE to develop any feature functionality applications. To the extent a CLEC wants to develop its own applications on the SCE Development Platform, an additional or expanded license would be required.

III. Resale of ILEC's Services Does Not Present the Same Concerns as Access to Unbundled Network Elements

Consistent with the positions taken by other commenters, resale of ILECs' services generally does not raise the same type of issues as access to unbundled network elements.¹⁰ Typically, when an ILEC sells services to a CLEC for resale, the ILEC is engaging in the use of its network facilities for which it was originally intended; and while such use would still be subject to any use restrictions set forth in the original license grant to the ILEC (e.g. capacity restrictions, patent limitations, etc.), this would not, in the ordinary course, give rise to the need for an additional license agreement.

Therefore, without waiving any rights to protect its intellectual property, Lucent's focus is on CLEC access to unbundled network elements and its impact on Lucent's intellectual property.

Another example of software typically licensed with third party use restrictions is End Customer Controlled (ECC) Software. This software permits the subscriber of telecommunications services to select operations systems enabling the subscriber to view data about the network or service or to directly activate or change features of the network. When ECC software is licensed to an ILEC, the license grant typically includes a right to sublicense, replicate and distribute ECC software to end-users as part of its business operations. This right to sublicense, replicate and distribute is personal to the ILEC. Thus, without an additional license agreement, a CLEC would not be permitted to sublicense, replicate and distribute such ECC software to its end-users.

⁹ For example vendors sometimes choose to license certain software to an ILEC based upon the activation of a particular feature or functionality by a subscriber line. Thus, every time a line activates a feature or functionality a fee is charged. Clearly, to the extent a CLEC has subscribers pursuant to its access to an unbundled network elements, who activate features or functionality, this feature activation fee would continue to apply.

¹⁰ See Nortel comments at 8; See SBC Communications comments at 14.

IV. Whether or Not Intellectual Property is Implicated by Access to Unbundled Network Elements is Not Determined by the Degree of Physical Control One Exerts Over the Element.

The Petition and several commenters suggest that intellectual property is not implicated in providing CLEC access to unbundled network elements because the ILEC retains physical control over the element.¹¹ In the case of resale of services or access to unbundled network elements, the ILEC retains control over the relevant service or element. However, notwithstanding the ILEC's "control" over the service and/or element, both the ILEC and CLEC will "use" the underlying intellectual property.¹² The issue is the *degree* of use by the CLEC, not the degree of control. Thus, it is imperative that the focus of any discussion on the implication of intellectual property be shifted from "control" to "use".

To support its "control" argument, AT&T also contends that numerous LECs have for years provided interexchange carriers and independent LECs with dedicated facilities and unbundled access to network capabilities that provide the same degree of control as access to network elements, without raising any claims that such provision violated any party's intellectual property rights.¹³ In so

¹¹ MCI Petition at 7; AT&T comments at 21. The control argument may be appealing to MCI and AT&T when their intellectual property is not the subject of inquiry. Lucent doubts either MCI or AT&T would agree with their own argument were their intellectual property at issue.

¹² As used herein, "control" refers to the actual possession of the service or element in which the intellectual property is embedded and "use" means access to functionality.

¹³ AT&T comments at 19.

stating, AT&T suggests that no intellectual property is implicated by providing CLEC access to unbundled network elements as required by the Act.

Specifically, AT&T cites seven examples of such prior access to support its position: (1) loops; (2) switching; (3) databases; (4) signaling; (5) dedicated transport facilities; (6) digital cross-connection; and (7) Service Management Systems (SMS) and Service Creation Environment (SCE) for purposes of AIN development.¹⁴

In each of these examples, AT&T contends that access to these elements has been provided in the past and that the degree of control and functionality afforded users in those situations is no less than the degree of control and functionality being contemplated by the access to unbundled network elements mandated by the Commission in its regulations. However, as stated earlier, whether or not prior access to the unbundled elements of any kind infringes the intellectual property rights of a vendor, or for that matter anyone else, is not determined by the degree of control or functionality afforded the CLEC. Instead it depends upon the terms and conditions contained in any applicable license agreement between the ILEC and its vendors, the use contemplated by the CLEC and the nature of the intellectual property used by the CLEC.¹⁵ The fact that prior

¹⁴ AT&T comments at 22 - 27.

¹⁵ For example, in making its "control" argument, AT&T cites a BellSouth offer in which BellSouth would permit third party service providers' access to BellSouth's capabilities. And as AT&T suggests, it may be true that the access and control provided to CLECs in that plan would be the same as the degree of access and control required by the Commission. However, the degree of control is not the determinant of whether additional licenses or fees were required, rather it was the scope of the license grant to the BellSouth. In

access may have been provided is not dispositive on the issue of whether or not the ILEC had all the necessary license rights from third parties to permit such use or access or whether such use or access otherwise violated the intellectual property rights of third parties, including vendors.

V. Resolution of This Issue Need Not Hinder the Progress Of CLECs' Entry into the Local Market

For the reasons stated above and in its initial comments, Lucent believes there are circumstances in which, as a vendor of telecommunications equipment and software and more broadly as an intellectual property owner, its intellectual property might be implicated by providing CLEC access to unbundled network elements. Accordingly, Lucent has provided examples, although not an exhaustive listing, of situations where that is the case. In such circumstances, additional rights or license agreements may be required. However, as Lucent has demonstrated in its comments, because of the significance of intellectual property to vendors' businesses, the value and utility of its intellectual property, and the unique and complex details of licensing such intellectual property, no blanket declaratory ruling can adequately address every situation.

fact, the Service Creation Environment (SCE) referenced by AT&T in this example was a Lucent provided software development platform. The terms under which the SCE was licensed to BellSouth would not have permitted BellSouth to make such an offering to third parties. Accordingly, a separate software tool was created for this offering and additional license terms and conditions were negotiated (for additional consideration) to expressly permit third parties to use this software tool to create services to be executed on the AIN platform.

Lucent believes the Commission can promote competition without compromising the intellectual property rights of third parties by: 1) recognizing, as all commenters have done in varying degrees, that vendors' rights in intellectual property are governed by the nature of the intellectual property, the applicable intellectual property and contract law, the use contemplated by the CLEC¹⁶, and the license grant terms and conditions¹⁷; 2) recognizing that in some circumstances, there will be a need to acquire additional rights or license agreements for access to certain unbundled network elements by CLECs, depending upon their contemplated use and other factors¹⁸; 3) focusing its decision on the allocation of responsibility between ILECs and CLECs for securing additional rights or licenses when necessary and; 4) focusing its decision on whether the allocation of such responsibilities should be decided on a state-by-state basis or whether a uniform set of rules must be implemented by the Commission.

Lucent stands ready to work with ILECs to make any changes which may be reasonably required under our agreements to permit CLECs' resale of ILECs' services and access to unbundled network elements and to identify, with the ILECs

¹⁶ It is Lucent's belief that CLECs' provision of telecommunications services will implicate the intellectual property of many parties, including, but not limited to, vendors of telecommunications infrastructure equipment. As a result, CLECs will be required to independently assess the intellectual property implications of these offerings.

¹⁷ This is supported by several commenters who have questioned the Commission's authority to make any decision in the area of intellectual property. See SBC Communications, Inc. comments at 1; See also Nortel comments at 3 - 5.

for release by the ILECs to CLECs pursuant to reasonable non-disclosure terms,
those portions of our agreements with ILECs which may be necessary for CLECs
to assess their additional intellectual property requirements, if any.

Respectfully submitted,



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and

MARY MCMANUS
Public Affairs Director

¹⁸ For example CLEC's combining unbundled network elements of an incumbent with elements of its own network or elements obtained from third parties to form an infringing combination or a CLEC's use exceeding the scope of the license grant to the ILEC.